

CAREY & ASSOCIATES LLC
Attorneys for Michael Q. Carey
D/B/A Carey & Associates
521 Fifth Avenue, Suite 3300
New York, NY 10175-3399
(212) 758 0076
Michael Q. Carey (1802)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	Chapter 13
RUDOLF J.O. ERNST and ANGELIKA L. ERNST,	Case No. 04-12291-CB

Debtors.

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**DESIGNATION OF APPELLANT'S RECORD ON APPEAL
AND STATEMENT OF ISSUES ON APPEAL
(RELATING TO THE MAY 4, 2007 NOTICE OF
APPEAL)**

Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure ("**Bankruptcy Rules**"), appellant Michael Q. Carey, d/b/a Carey & Associates ("**Carey**"), submits the following designation of the Record on Appeal and Statement of Issues on Appeal.

DESIGNATION OF RECORD ON APPEAL

1. Debtors' Voluntary Petition (Chapter 13), filed April 5, 2004 (Docket No. 1);¹
2. Debtors' Schedules, Statement of Financial Affairs, and Statement Pursuant to Rule 2016, filed April 20, 2004 (Docket

¹ This docket number, and all subsequent references to the docket, refers to the electronic docket maintained by the United States Bankruptcy Court for the Southern District of New York in Case No. 04-12291-jmp.

No. 6);

3. Debtors' Chapter 13 Plan, filed April 20, 2004 (Docket No. 7);

4. Carey's Proof of Claim and supporting exhibits, dated and filed July 27, 2004 (Claim No. 9-1);

5. Motion for Relief from Stay filed by Michael Q. Carey on behalf of Michael Q. Carey, with hearing to be held on 10/7/2004, (Attachments: # 1 Carey Declaration in Support of Motion; # 2 Certificate of Service) (Entered: 09/07/2004) (Docket No. 15);

6. Memorandum of Law in Support of Motion for Relief from Stay filed by Michael Q. Carey on behalf of Michael Q. Carey (Entered: 09/07/2004) (Docket No. 17);

7. Notice of Motion of Debtors' Objection to Claim No. 9; Memorandum of Law in Support of Objection to Claim No. 9; and Statement in Support of Objection to Claim No. 9, each dated September 27, 2004 (Docket No. 18);

8. Opposition to Motion for Relief from Stay filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Entered 10/25/2004) (Docket No. 21);

9. Carey's Opposition Brief to Debtors' Objection to Claim No. 9; and supporting Declaration of Michael Q. Carey with attached exhibits, each dated October 28, 2004 (Docket No. 22);

10. Reply to Motion to Lift Stay filed by Michael Q. Carey on behalf of Michael Q. Carey; Declaration of Natasha P. Concepcion (Entered: 10/28/2004) (Docket No. 23);

11. Order Signed On 11/19/2004 Granting Re: Motion Modifying The Automatic Stay Filed On Behalf Of Michael Q. Carey d/b/a Carey & Associates (Entered: 11/19/2004) (Docket No. 29);

12. Order Signed On 12/9/2004 Denying Re: That Portion Of The Motion Seeking Relief From The Automatic Stay, To Permit The Supreme Court In New York County, To Determine The Allowable Amount Of Legal Fees, et. al. (Entered: 12/10/2004) (Docket No. 32);

13. Application for Final Professional Compensation for Michael Q. Carey from 8/1/1998 through 3/31/2004, dated December 17, 2004; and Affidavit of Michael Q. Carey in Support of Fee Application, sworn to on December 17, 2004 (Docket Nos. 33, 34, 35, 36, 37 & 38);

14. Notice of Conventional Filing of Transcript with hearing held on 11/4/2004 Adj. Hrg. Re: Doc #15; motion for an order for relief from stay filed on behalf of Michael Q. Carey d/b/a Carey & Associates, LLC, et al. (Entered: 12/21/2004) (Docket No. 40);

15. Notice of Conventional Filing of Transcript with hearing held on 11/18/2004 Re: Hearing, (04-3605) Carey v. Ernst, Motion for an Order to Dismiss the Amended Complaint filed on behalf of

Defendants Franklin Community Bank, NA and Larry A. Heaton.

(Entered: 12/22/2004) (Docket No. 41);

16. Notice of Motion for Additional Time to Conduct Discovery and to Further Object to the Carey Fee Application, dated January 7, 2005 (Docket No. 46);

17. Debtors' Opposition to Fee Application Submitted by Michael Q. Carey, Esq. and Carey & Associates and in Support of Cross-Motion for Additional Time to Conduct Discovery and to Further Supplement this Opposition, with attached exhibits, dated January 7, 2005 (Docket No. 47);

18. Amended Schedule D filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Attachments: #1: Declaration Concerning Debtors' Amended Schedule D; #2: Statement Pursuant to Local Rule 1009- 1; #3: Certification of Service) (Entered: 02/04/2005) (Docket No. 49);

19. Opinion of Hon. Cornelius Blackshear, dated February 22, 2005 (Docket No. 50);

20. Motion to Extend Time for Payment Period of Chapter 13 Plan to Sixty Months filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst with hearing to be held on 3/17/2004 (Attachments: # 1 Application) (Entered: 02/25/2005) (Docket No. 54);

21. Order Signed On 3/7/2005 Re: That Debtors' Objection To

Claim Is Granted In Part And Denied In Part, An It Is Further,
Ordered That Claimant's Fee Application Is Denied (Entered:
03/07/2005) (Docket No. 58);

22. Motion for Stay Pending Appeal filed by Michael Q. Carey on
behalf of Michael Q. Carey with hearing to be held on 3/17/2005
(Attachments: # 1 Memorandum of Law in Support of Motion for
Stay Pending Appeal; #2 Affidavit of Michael Q. Carey in Support
of Motion for Stay Pending Appeal; #3 Proposed Order) (Entered:
03/07/2005) (Docket No. 60);

23. Motion to Amend and Correct the Memorandum of Law in
Support of Motion to Stay Confirmation Hearing Pending Appeal,
dated March 7, 2005 filed by Michael Q. Carey on behalf of
Michael Q. Carey with hearing to be held on 3/17/2005 (Entered:
03/09/2005) (Docket No. 64);

24. Opposition to Debtors' Motion for Approval of Application
to Amend Plan Extending Payment Period to 60 Months filed by
Michael Q. Carey on behalf of Michael Q. Carey with hearing to
be held on 3/17/2005 (Entered: 03/10/2005) (Docket No. 66);

25. Opposition to Motion for Stay Pending Appeal filed by
Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst
(Entered: 03/14/2005) (Docket No. 75);

26. Operating Report for the months of April 2004 through
February 2005 filed by Joseph L. Fox on behalf of Rudolf J.O.

Ernst (Entered: 03/17/2005) (Docket No. 78);

27. Sua Sponte Order Signed On: 3/17/2005 Denying Motion To Stay Confirmation Pending Appeal By Michael Q. Carey (Entered: 03/17/2005) (Docket No. 79);

28. Sua Sponte Order Signed On 3/24/2005 Re: Denying (1) Motion For Leave To Commence An Adversary Proceeding And Denying (2) Motion To Stay Confirmation Pending Appeal (Collectively) Are Stayed Until The End Of The Business Day Of 3/28/2005 (Entered: 03/24/2005) (Docket No. 83);

29. Affidavit of Joseph L. Fox in Opposition to Motion for Stay Pending Appeal filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Attachments: # 1 Exhibit A; # 2 Exhibit A-Subexhibits I; # 3 Exhibit A-Subexhibits II; # 4 Exhibit A-Subexhibits III; # 5 Exhibit A-Subexhibits IV; # 6 Exhibit B; # 7 Exhibit B-Subexhibits I; # 8 Exhibit B-Subexhibits II; # 9 Exhibit B-Subexhibits III# 10 Exhibit Exhibits C and D) (Entered: 04/04/2005) (Docket No. 91);

30. Memorandum of Law in Opposition to Motion for Stay Pending Appeal filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst (Entered: 04/04/2005) (Docket No. 92);

31. Notice of Conventional Filing of Transcript with hearing held on 1/20/2005 Adj. Hrg. Re: Doc #8 Pre-Trial Conference, et al. (Entered: 04/08/2005) (Docket No. 97);

32. Objection (Amended) to Confirmation of Debtors' Chapter 13 Plan filed by Michael Q. Carey on behalf of Michael Q. Carey with hearing to be held on 5/26/2005 (Attachments: # 1 Exhibit to Carey's Amended Objection to Confirmation of Debtors' Chapter 13 Plan) (Entered: 04/26/2005) (Docket No. 98);

33. Affirmation of Rudolf J.O. Ernst in Response to Objection to Confirmation filed by Michael Q. Carey and Carey & Associates filed by Joseph L. Fox on behalf of Rudolf J.O. Ernst with hearing to be held on 5/26/2005 (Entered: 05/23/2005) (Docket No. 102);

34. Affidavit of Michael Q. Carey (Objection to Confirmation of Debtors' Chapter 13 Plan) filed by Michael Q. Carey on behalf of Michael Q. Carey (Entered: 05/25/2005) (Docket No. 104);

35. Order Signed On 5/26/2005 Re: Confirming Chapter 13 Plan (Entered: 05/27/2005) (Docket No. 106);

36. Notice of Conventional Filing of Transcript of Hearing Held on May 26, 2005, Adj. Hrg. Re: Doc. # 53 Application for Allowance of Fees and Expenses of Joseph L. Fox for Debtor, et al., filed by Veritext LLC (Entered: 07/22/2005) (Docket No. 108);

37. Opinion and Order of U.S. District Court Judge Robert P. Patterson Jr. signed on 11/8/2005; re: 57, 81, 82 appeals. The decision of the Bankruptcy Court is upheld with respect to its

denial of Carey's post-petition interest, reduction of Carey pre-petition, pre-judgment interest from 12% to 9%, and its denial of Carey's motion for leave to commence an adversary proceeding. With respect to the Bankruptcy Court's denial of Carey's fee application in its entirety, this appeal is remanded to the Bankruptcy Court for further findings consistent with this opinion (Entered: 11/21/2005) (Docket No. 109);

38. Transcript with hearing held on 11/4/04 Re: Adj. Hrg. Re: Doc # 15; motion for an order for relief from stay filed on behalf of Michael Q. Carey d/b/a Carey & Associates LLC, et al. filed by Clerk's Office of the U.S. Bankruptcy Court (Entered: 02/15/2006) (Docket No. 111);

39. Transcript of hearing held on 5/26/05. Hrg. Re: Doc #53 Application for allowance of fees and expenses of Joseph L. Fox for debtor et al. filed by Clerk's Office of the U.S. Bankruptcy Court (Entered: 02/21/2006) (Docket No. 112);

40. Letter Dated 5/8/2006 Re: Mr. Joseph L. Fox, Esq., Response To Mr. Michael Q. Carey, Esq., Letter Dated 5/1/2006 Regarding The Parties Submit To Non-binding Mediation With Respect To The Carey Fee Application filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst (Entered: 06/20/2006) (Docket No. 113);

41. Letter Dated 7/11/2006 Re: Carey & Associates Fee Application-Offer To Compromise filed by Michael Q. Carey on

behalf of Michael Q. Carey (Entered: 07/26/2006) (Docket No. 115);

42. Letter Dated 7/27/2006 Re: Response To Letter Dated 7/11/2006 (related document(s)115, 113, 114) filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Mercado, Tracey) (Entered: 07/31/2006) (Docket No. 116);

43. Letter Request for Hearing on Carey's Fee Application, and for Status/Scheduling Conference 2 Weeks in Advance of Hearing filed by Michael Q. Carey on behalf of Michael Q. Carey. (Carey, Michael) (Entered: 09/28/2006) (Docket No. 117);

44. Letter filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Fox, Joseph) (Entered: 10/03/2006) (Docket No. 118);

45. Amended Application for Final Professional Compensation for Michael Q. Carey, Creditor's Attorney, period: 8/1/1998 to 3/31/2004, filed by Michael Q. Carey. (Attachments: # 1 Affidavit of Michael Q. Carey in Support of Amended Fee Application; and attached Exhibits A-O to the Amended Fee Application (Entered: 10/16/2006) (Docket Nos. 119, 120, 121, 122);

46. Carey's Amended Proof of Claim and supporting exhibits, dated and filed 10/16/2006 (Amended Claim No. 9: Claim 9-2);

47. Transcript of Hearing Held on November 9, 2006 Re: Status

Conference filed by Deborah Huntsman (Entered: 11/28/2006)
(Docket No. 123);

48. Stipulation Regarding Hearing on Carey's Amended Fee Application filed by Michael Q. Carey on behalf of Michael Q. Carey (Entered: 12/14/2006) (Docket No. 125);

49. Letter Pursuant to Local Rule 7056-1 filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst. (Attachments: # 1 Certificate of Service) (Entered: 12/22/2006) (Docket No. 126);

50. So Ordered Stipulation Between The Debtors And Carey & Associates, LLC Signed On 12/28/2006 Re: Scheduling A Hearing And Setting Deadline For Production Of Documents Regarding Carey's Amended Fee Application; with A Hearing To Be Held On 2/15/2007 (Entered: 12/28/2006) (Docket No. 127);

51. Motion for Summary Judgment Seeking Order Disallowing, Dismissing and Expunging Amended Claim No. 9-2 filed by Michael Q. Carey d/b/a Carey & Associates filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst with hearing to be held on 2/15/2007 (Attachments: # 1 Notice of Motion; # 2 Statement of Undisputed Facts; # 3 Affirmation of Joseph L. Fox, Esq. in Support; # 4 Affidavit of Debtor Rudolf Ernst in Support; # 5 Statement with regard to exhibits being too voluminous to file) (Entered: 01/18/2007) (Docket No. 130);

52. Memorandum of Law in Support of Debtors' Motion to Disallow, Dismiss and Expunge Amended Claim No 9-2 filed by Michael Q. Carey d/b/a Carey & Associates filed by Joseph L. Fox on behalf of Angelika L. Ernst, Rudolf J.O. Ernst (Entered: 01/18/2007) (Docket No. 131);

53. Memorandum of Law in Opposition to Debtors' Motion for Summary Judgment filed by Michael Q. Carey on behalf of Michael Q. Carey. (Attachments: # 1 Affidavit of Natasha P. Concepcion in Opposition to Debtors' Motion for Summary Judgment; # 2 Carey's Response to Debtors' Statement of Undisputed Facts Pursuant to Local Rule 7056-1(b) and Carey's Statement of Disputed Facts) (Entered: 01/24/2007) (Docket No. 134);

54. Letter Dated 1/29/2007 Re: The Court Re-scheduled This Evidentiary Hearing Regarding The Debtors' Motion For Summary Judgment (related document(s)129, 131, 132, 130, 134) filed by Clerk's Office of the U.S. Bankruptcy Court with hearing to be held on 3/15/2007 (Mercado, Tracey) (Entered: 01/30/2007) (Docket No. 136);

55. Letter (AMENDED AND REVISED) Dated 2/1/2007 Re: The Court Re-Scheduled This Hearing For Oral Argument On The Debtor's Motion For Summary Judgment And Consideration Of The Previous Scheduled Matters; (related document(s)129, 131, 132, 136, 130, 134, 135) filed by Clerk's Office of the U.S. Bankruptcy Court with hearing to be held on 3/15/2007 (Mercado, Tracey) (Entered:

02/05/2007) (Docket No. 137);

56. Transcript of Status Conference Held on 3/15/07 filed by Deborah Huntsman, Court Reporter. (Richards, Beverly) (Entered: 04/03/2007) (Docket No. 138);

57. Sur-Reply to Motion by Debtors for Summary Judgment filed by Michael Q. Carey on behalf of Michael Q. Carey (Entered: 04/13/2007) (Docket No. 139);

58. Memorandum of Decision Signed on 4/27/2007 Granting the Debtors' Motion for Summary Judgment and Disallowing Amended Claim of Michael Q. Carey for Attorneys' Fees (Nulty, Lynda) (Entered: 04/27/2007) (Docket No. 141);

59. Notice of Appeal of the Order of the Bankruptcy Court entered April 27, 2007, and Civil Cover Sheet, each dated May 4, 2007 (Entered 05/04/2007) (Docket No. 143).

STATEMENT OF ISSUES ON APPEAL

The following issues will be raised on appeal, among others:

- (1) Did the Court err in holding that Ween v. Dow, 35 A.D.3d 58, 802 N.Y.S.2d 257 (App. Div. 1st Dep't 2006) was controlling precedent?
- (2) Did the Court abuse its discretion in ruling that there was no dispute regarding the meaning of the Ween decision?
- (3) Did the Court err in reading Ween to hold that an attorney's contract claim based on a unilateral right to collection fees and disbursements pursuant to an otherwise valid retainer agreement was not enforceable as a matter of public policy where the attorney's contract claim was not at issue before the Ween court?
- (4) Did the Court err in holding that there was no strong indication that the state's highest court would decide the issue in Ween differently?
- (5) Did the Court err in holding that Ween was controlling precedent within the meaning of 11 U.S.C. § 502(b)(1) even though Ween was not the applicable law as of the date of the filing of the petition?
- (6) Did the Court err in applying Ween *ex post facto*?
- (7) Did the Court abuse its discretion in speculating about the necessity of the services performed, and the reasonableness of the claim made for fees and disbursements, without conducting the hearing ordered by the United States District Court?
- (8) Did the Court err in abrogating Carey's contract with debtors for collection fees and disbursements?
- (9) Did the Court misinterpret Carey's argument based on the doctrine of *res judicata*?
- (10) Did the Court abuse its discretion in failing to consider whether the Supreme Court decision finding debtors liable on Carey's contract claim for collection costs became a final non-appealable decision prior to Ween?

Dated: May 14, 2007
New York, New York

CAREY & ASSOCIATES LLC

By: /s/ MICHAEL Q. CAREY
Michael Q. Carey (MC 1802)
Attorneys for Michael Q. Carey
d/b/a Carey & Associates
521 Fifth Avenue, Suite 3300
New York, NY 10175-3399
Tel: 212-758-0076
Fax: 212-758-0069